

# NAEB

## PRESIDENT'S MEMO

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### COPYRIGHT LAW REVISION

This is a second report on copyright developments affecting educational broadcasting. Before reporting on their current status, it will be helpful to provide background and review of events leading up to the present situation.

#### The Need for Modernizing the Copyright Law

The present Copyright Law was enacted in 1909. So many technological changes have taken place since then, particularly in the ways materials may be recorded, reproduced, and transmitted <sup>(1)</sup> that vigorous efforts to revise the Act have been made in recent years. In 1955, Congress authorized the Copyright Office to conduct studies on revision of the copyright law and in 1961, the Register of Copyrights submitted to Congress tentative recommendations for such revision. During the past year, the Copyright Office has conducted a number of panel discussions to consider these recommendations and comment upon the Register's preliminary draft.

The revision attempts to extend the present concept of copyright (developed to cover intellectual creations reproduced in printed form) to cover a variety of new methods of publishing made possible by present technology and those forthcoming in the future. <sup>(2)</sup> Education has now made a preliminary statement of its viewpoint.

#### Activities Expressing Education's Concern

In March, 1962, NEA called a national conference on professional, legal, and ethical problems for teachers in connection with technological developments in education, including copyright problems.

(1) e.g., audio records and tapes, video tapes, photo-copy, microfilm, radio, television, etc.

(2) Including conversion of printed material into electronic information which can be stored in computerized libraries retrievable for widespread dissemination via cable or microwave and print-out at multi-reception points.

In 1963, NEA-DAVI initiated a conference of 47 institutions and organizations (including NAEB) to discuss the proposed revisions of the copyright law and to determine what steps education should take. The first step was to establish a widely-representative Ad Hoc Committee on Copyright Law Revisions (including NAEB).

This committee held a number of meetings and, in addition, attorneys for NEA, NET, and NAEB held many drafting sessions. The outcome was the formulation of a common position for the education profession.

A statement on behalf of education, endorsed by 25 <sup>(3)</sup> educational organizations (including NAEB and NET) was presented at the Copyright Panel Meeting at the Library of Congress, January 18, 1964. Because education has been slow in participating in the various hearings the Register of Copyrights has been conducting, this presentation representing a marshalling of such widespread representational strength <sup>(4)</sup> took many by surprise and created a considerable impression.

One of the first reactions was an approach by the textbook publishers to talk over differences with the Ad Hoc Committee. This session was held February 11 with presidents of several publishing firms and representatives of the Book Publisher's Council and the American Textbook Publishers Institute. Similar discussions may be held in the near future with representatives of magazine publishers and other groups having views differing from the position education has taken. Such conferences will be part of a continuing activity of the Ad Hoc Committee as it seeks to shape and refine its position statement in preparation for the Congressional hearings on Copyright Law Revisions.

#### Amendment or a New Copyright Law?

Analysis of the present copyright law and of current proposals for its revision led the Ad Hoc Committee to the conclusion that the copyright law has clearly failed to keep up with technological developments of the present and is quite inadequate to the developments which can be predicted. In fact, the matter is so complex and complicated that many feel that the best solution would be to start from scratch with a whole new approach, rather than try to patch up the present outmoded law. The Committee was finally convinced, however, that there was no likelihood that this could be done and that the only possible way to obtain any improvement in the present requirements was through amendment of the existing copyright law.

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(3) Many more are expected to add their endorsement when there is time to follow constituted procedures.

(4) For example: AAUW, AASA, AACT, ACE, Council of Chief State School Officers, and the National School Boards Association.

## Education's Objectives

Education needs to be allowed to perform its vital role in our society and to do this, non-profit educational institutions must have maximum availability of teaching materials and resources. Congress has said that the national interest requires special recognition for education under the Copyright Law; this recognition, however, has not been heretofore fully achieved and is now threatened with virtual extinction. Several revisions proposed would seriously restrict the use of new media in education and tend to reverse the trend toward increased use of the electronic media for instruction. Education needs:

1. a more effective and more inclusive special recognition for education than the one already written into the copyright law by the "for profit" limitation;
2. clarification of "fair use" in the law so that educators may readily know what they can legally use in the educational process; and
3. a logical and reasonable extension of present rights accorded education.

## Proposed Changes in Copyright Law

The present copyright law does not afford copyright owners proper protection; at the same time the clearly expressed Congressional policy to protect education's interest under the copyright law has been partially thwarted by its failure to keep up with technology.

The proposed changes, however, not only fail to improve the situation for "bona fide" educational uses of copyrighted materials, but threaten to diminish or eliminate the present inadequate protections. In particular, education is concerned about these copyright revisions:

### 1. Elimination of "for profit" provision

The present law states a basic public policy that education shall have certain prior rights of full and complete access to specific types of copyrighted materials, i.e., copyrighted historical, political, and musical material so long as it is not dramatized and is not performed "for profit."

The Register's draft bill of 1963 suggests an alternative to the "for profit" provision which would radically change the present situation by depriving education in general and educational broadcasting in particular of its present legal permission to perform non-dramatic literary and musical copyrighted materials! (Such a provision would prevent the use on educational radio or television of non-dramatic copyrighted materials without first obtaining permission or paying royalties.)

### 2. Elimination of "fair use" doctrine

Under the present law, the hinderances placed upon education have been alleviated to some extent by the judicially-developed doctrine of "fair use", i.e., the reproduction of a small part of a work to illustrate a classroom lesson or the broadcast of a portion of a piece of music or televising a section of a map in which the use is limited and in circumstances where there is a reasonable purpose which is non-competitive with the copyright owner's market. However, there is no statute

of "fair use" and the courts must decide each case on its own merits. Accordingly, there is much uncertainty about one's legal rights in proceeding under the doctrine of "fair use." There is no specific number of words, lines, or notes that can be used safely without permission and acknowledgment of source is no protection against infringement. However, book publishers and other commercial groups are challenging the propriety of any interpretations and are exerting pressures to write into the new copyright law specifications which would further curtail the application of "fair use" in education.

The ambiguities in the application of "fair use" have caused educational broadcasters serious difficulties and seriously diminished its value to education. Failure to spell out what rights and privileges education has under the law will increasingly oblige broadcasters to forego the use of written and visual materials because of the risk of infringement and because of the increasing tendency of copyright owners to take such cases to court.

### 3. Duration of Copyright

Present law provides protection for 28 years with the privilege of 28 year renewal; after that the work is in public domain. Current proposals would extend the time before copyrighted materials come into public domain. One provides that the first term remain 28 years and the second term be extended to 48 years. Other proposals suggest that copyright be for the life of the author plus 50 years or 75 years from the date of creation or publication of the work.

Since education's need is the ready availability of materials, it is opposed to proposals which would increase the duration copyrighted materials and slow their availability in the public domain.

### 4. Deposit copies

To copyright materials under the present law requires the deposit with the Register of Copyrights of two copies, e.g., two audio tapes, two video tapes, two films, etc. Since stations ordinarily make only a single copy of a program and because tapes - especially video tapes - are expensive, this requirement seems unduly burdensome, unnecessary, and impractical. This requirement, a carry-over from the days when manuscripts or printed materials were all that was copyrighted, is unsuited to the variety of materials on which copyrighted content may be recorded today.

Education should be relieved of this onerous requirement and a more reasonable and appropriate provision made to meet the needs for present and historical records.

### Education's Proposed Amendment

In a positive effort to improve upon the unsatisfactory portions of the law, the Committee has proposed an amendment which would include its objectives in one section which would be applicable only to non-profit educational institutions.



"Anything to the contrary in this title notwithstanding, no protection or exclusive right granted or provided under this title shall include the right to prevent use by recognized non-profit educational institutions or organizations --

- (a) of non-dramatic copyrighted works for non-commercial purposes, provided that such use shall not permit more than a single copy or recording of such copyrighted works (5)
- (b) of dramatic copyrighted works for performance within non-profit educational institutions or organizations, which performance is limited to or directed at the students or faculty thereof and is available without an admission fee being charged to such students and faculty, provided that such use shall not permit more than a single copy or recording and only of a performance in which the performers are limited to such students and faculty,
- (c) of excerpts or portions of non-dramatic or dramatic copyrighted works for illustrative, critical or similar educational purposes, provided that such excerpts are clearly identified as to sources and copyright holders,

--where no commercial advertising is included, nor other private financial gain is involved.

What use would the Ad Hoc Committee's proposals authorize education to make of copyrighted works? Where no commercial advertising is included nor other private financial gain is involved, the following use by education would be allowed without royalty payments or prior clearances:

I. As to an entire copyrighted work:

- A. For non-dramatic works
  - 1. performance (i.e., "live" use) would be permitted for all non-commercial educational purposes (i.e., classroom use, educational closed circuit TV, educational TV stations, and other educational uses except on commercial TV stations) and
  - 2. a single copy or recording would be permitted of each such use. (5)
- B. For dramatic works:
  - 1. performance would be permitted within non-profit educational institutions or organizations under specific circumstances; and
  - 2. a single copy or recording would be permitted of each such use only where the performers were limited to such students and faculty.

II. As to excerpts or portions of either a dramatic or non-dramatic works, "live performance" as well as multiple copies would be permitted only for illustrative, critical or similar educational purposes and only where there is clear identification as to sources and copyright holders. The present draft does not specify any definition of excerpts or portions."

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- (5) This point is not satisfactory to NET and NAEB. It is scheduled for further discussion by the Committee.

### Copyright and the Constitution - Public Interest Considerations

Some argue that copyright is a constitutional right and consequently Congress has no authority to limit this property right. Actually, the Constitution grants no rights to authors; it merely grants power to Congress to enact copyright legislation. Since copyright protection is solely a matter of statute, the author's privilege may be limited or withheld by Congress at its discretion. This view has been supported by both the legislature and the judiciary.

The House Report on the present copyright law stated that such rights were to be given "not primarily for the benefit of the author, but primarily for the benefit of the public." In a unanimous opinion of the Supreme Court, Chief Justice Hughes wrote: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefit derived by the public from the labors of authors."

A report to Congress by the Register of Copyrights also reflects this view: "Within limits the author's interests coincide with those of the public. when they conflict, the public interest must prevail ... And the interests of authors must yield to the public welfare when they conflict ... The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest."

Education is of paramount public interest and education is the most universal expression of public interest in the United States.

### Probable Time Table

The Copyright Office is now completing the preliminary drafting of an actual bill and hopes to have it completed for presentation to Congress in 1964 - possibly in late spring. Extensive hearings will then be held before the Judiciary Committees for the House and Senate, though it is not expected that such hearings will be scheduled before fall.

When such hearings are held, everyone concerned will have an opportunity to express his views via written and/or oral testimony. The statement in behalf of the educational organizations group will be presented and NAEB (and possibly several of its Divisions) will testify or file statements.

It is likely that these hearings will extend over a considerable period and that there will be no enactment in 1964. In that case, the bill will need to be re-introduced in the new Congress, together with possible revisions suggested by the 1964 hearings.

However long the revision of the Copyright Law may take, it is evident that representations to the Register right now, during the period when he is casting the bill, are apt to have more effect than at any subsequent point in the course of this legislation. Anyone wishing to endorse the recommendations and proposals of the Ad Hoc Committee or express any other view should make his wishes known to school board officials, educational administrators, and others in their state and in

Washington who may have responsibility for dealing with this matter. The Register of Copyrights is Mr. Abraham L. Kaminstein, Library of Congress, Washington, D. C.

### Some Personal Observations

As has been pointed out, the present concept of copyright is outmoded, but how the law is to be altered so as to accommodate technological changes and still preserve a fair balance between the rights of the author and the public interest is a far from simple matter, and despite the built-in biases of educational people, far from black and white.

To begin, educators are both users and producers of copyrighted materials; faculty people write books as well as use them; educational stations copyright programs as well as broadcast them, staff writers copyright scripts as well as utilize copyrighted materials in their own scripts, etc. Consequently, the educational community has a stake in both reasonable access to copyrighted materials but also in reasonable protection under the law for the intellectual products it creates.

Moreover, education, which readily asserts its need for access to copyrighted materials for effective teaching uses, would be shortsighted, indeed, to be so insistent upon privilege as to dry up the wells of creativity upon which it depends. There is a Russian fable about a pig who, after eating his fill of acorns, began rooting around under the oak tree. A crow remarks, "If you lay bare the roots, the tree will wither and die." "Let it die," replied the pig, "who cares as long as there are acorns?"

Understandably, educational broadcasters will have a passionate addiction to advancing legislation in ways which enhance their opportunities for more likely achievement of their goals and responsibilities, but we would be derelict in our professional and civic responsibilities if we did not make a sincere effort, while having a proper concern for our special interests, to work for a law which would prevent unethical, unrestrained, and flagrant abuse of the legal rights of authors with respect to the form of use of their work. The publishing industry would seem to have a stake in educational broadcasting because of the promotion it can provide for published materials and the stimulation of reading interest. Film producers have a stake in educational broadcasting because of the increased demand for their films which result from their viewing on ETV. The trick is to write a law which will encourage the fullest use by educators of copyrighted materials for educational purposes that are consistent with a reasonable protection of author's rights. Hopefully, we can develop a law which will eliminate confusion and manifest inequities and benefit the broadcaster, the author, the publisher - and the public.

This will require some educational statesmanship to bring about a synthesis of private interests and the general public interest (which we equate with that of education.) Furthermore, though there might be temptations for broadcasters to make special "deals" outside the educational community, this would ultimately be against our best interests. There is substantial unity among commercial interests in sponsoring amendments antithetical to educator's interests. Cohesion and joint organizational action are needed to make education persuasive where needed.

The foregoing is not meant to be a complete account of what is a very complex topic. We will provide periodic reports dealing with other considerations not covered here, and with new developments. The position of education on these ~~issues~~ is, of course, far from crystallized. It is subject to modification and revision over the months (and possibly years) ahead. All NAEB members are encouraged to comment, criticize, or otherwise respond to this memo so that we may take your views into account now and throughout the period in which the copyright law is being revised.

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This memorandum is based in large measure on the following references:

Hyer, Anna L., Proposed Copyright Changes: the Media Specialist and the Teacher

A paper prepared for the Educational Media Council

Lacy, Dan, Copyright Law Revision and Book Publishing. A memorandum prepared for the American Book Publishers Council

Rosenfield, Harry N., Educations Interest in Copyright Law Revision. A statement before Panel of Consultants to Register of Copyrights



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